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Supreme Court, U.S.
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No. 06-145

IN THE

Supreme Court of the United States

ALLEN D. ADAMS, II, *et al.*,
Petitioners,

v.

PENSION BENEFIT GUARANTY CORPORATION AND PICHIN CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT PICHIN CORPORATION'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

During a Chapter 11 proceeding involving a bankrupt airline, the Pension Benefit Guaranty Corporation ("PBGC") entered into a court-approved Comprehensive Settlement Agreement that was negotiated in 1992 among all affected parties, including (i) the debtor airline, (ii) the PBGC, (iii) the collective bargaining representatives of the airline's employees, and (iv) representatives of the airline's controlling shareholder. That settlement was the linchpin of a successful Chapter 11 reorganization of the debtor airline that enabled the airline's employees to keep their jobs, provided that the airline's existing defined benefit pension plans would continue in operation and receive funding from the reorganized entity and related entities (as they did for many years), provided for the future termination of the pension plans upon the occurrence of certain potential defined "Significant Events," and provided that, in the event of such termination, the related entities' termination payments would be capped at $240 million.

Did the PBGC have authority under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), to enter into the Comprehensive Settlement Agreement?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The following are parent companies or any publicly held company that has a 10% or greater ownership interest (such as stock or partnership shares) in Pichin Corporation:

Arnos Corp.

Unicorn Associates Corporation

ACF Industries Holding Corp.

Highcrest Investors Corp.

Buffalo Investors Corp.

Starfire Holding Corporation

NM Holding Corporation.

These representations are made in order that Justices of this Court may determine the need for recusal. As such, we have erred on the side of caution and have construed the term "parent" broadly. Pichin Corporation does not admit that any listed entities are parent corporations for purposes other than this Disclosure Statement.

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STATUTORY PROVISIONS INVOLVED

A relevant statutory provision of ERISA, 29 U.S.C. § 1369,[1] is set forth on page 1 of the Appendix ("App."). Other pertinent statutes are contained in the Appendix to the Petition.

[1] Consistent with the approach employed in the Petition, this brief cites relevant provisions of ERISA according to their section numbers as codified in title 29 of the United States Code, rather than the section numbers in the enacted statute.

COUNTER-STATEMENT OF THE CASE

The Petition for Writ of Certiorari filed by seven former Trans World Airlines, Inc. ("TWA") pilots (the "Pilots" or "Petitioners") involves yet another belated attack on the provisions of a court-approved Comprehensive Settlement Agreement ("CSA") which was negotiated in 1992 by the Pilots' collective bargaining representative, TWA, the Pension Benefit Guaranty Corporation ("PBGC"), and others, as part of TWA's successful bankruptcy reorganization.[2]

In 1992-1993, the Pilots, through their union, the Air Line Pilots Association, International ("ALPA"), entered into the CSA to induce TWA's then-owner Carl Icahn to fund TWA's bankruptcy reorganization and sponsor TWA's pension plans, including the Retirement Plan for Pilots of Trans World Airlines, Inc. ("Plan" or "Pilots' Plan"). ALPA signed the CSA on behalf of the Pilots, who all were active TWA pilots at the time. (C.A. App. at 79-85.) ALPA warranted that it had received all necessary authorization from its membership to sign the CSA. (C.A. App. at 207.) Icahn and several Icahn-affiliated entities (including respondent Pichin Corporation) (collectively, "Icahn"), the PBGC, TWA and TWA's other unions also signed the CSA, and warranted their authority to do so. (C.A. App. at 44-47, 203-09, 244-58.)

The United States Bankruptcy Court for the District of Delaware approved the CSA, which was the cornerstone of TWA's successful Plan of Reorganization. *Infra* § A. That reorganization saved the Pilots' jobs. Moreover, during the next eight years, the Pilots' statutory pension benefits guaranteed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA") increased by up to 44% and more than half a billion dollars in assets were allocated to TWA's pension plans. *Infra* § A.

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[2] The CSA is reproduced (without exhibits) in the parties' Joint Appendix filed in the Court of Appeals ("C.A. App.") at 181-270.

In December 2000, when Pichin, the Icahn-affiliated entity serving as Plan sponsor pursuant to the CSA, exercised its CSA right to request termination of TWA's pension plans, ALPA filed a lawsuit challenging the very agreement it had signed eight years earlier on behalf of all TWA pilots. The District Court rejected ALPA's challenge to the CSA, and the D.C. Circuit affirmed, expressly holding that "federal law authorizes . . . settlement agreements like the one challenged in this case . . . ." *Allied Pilots Ass'n v. Pension Benefit Guar. Corp.*, 334 F.3d 93, 95 (D.C. Cir. 2003) ("*Allied Pilots*"). No further review of that judgment was sought.

Notwithstanding the D.C. Circuit's decision upholding the CSA in *Allied Pilots*, Petitioners persisted in asserting a separate, belated challenge to the CSA. Both the District Court and the Court of Appeals dismissed Petitioners' follow-on lawsuits, holding both (i) that the lawsuits were nothing more than an attempted end-run around the *Allied Pilots* decision, *Adams v. Pension Benefit Guar. Corp.*, 332 F. Supp. 2d 231, 236 (D.D.C. 2004), *aff'd* 170 Fed. Appx. 142 (D.C. Cir. 2006), Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 4, 13, and (ii) that the PBGC had full authority under ERISA to settle its claims against TWA and Icahn by entering into the CSA, including the CSA's provision capping Icahn's payments upon Plan termination at $240 million, *Adams*, 332 F. Supp. 2d at 236-37; 170 Fed. Appx. at 142, Pet. App. at 4, 14-15. The Petition seeks review of that judgment.

A. The CSA Is Adopted As Part Of TWA's Bankruptcy Re-Organization In 1992.

TWA filed for Chapter 11 bankruptcy on January 31, 1992. *Air Line Pilots Ass'n, Int'l v. Pension Benefit Guar. Corp.*, 193 F. Supp. 2d 209, 212 (D.D.C. 2002) (Urbina, J.), *aff'd sub nom. Allied Pilots*, 334 F.3d 93. The PBGC promptly announced its intention to terminate TWA's pension plans,

including the Pilots' Plan, and to pursue TWA and Icahn for an alleged $1.124 billion in termination liability. *Id.* at 212-13. Icahn disputed the alleged liability on the ground that Congress's 1991 amendment of ERISA[3] specifically to hold Icahn personally liable for underfunding of TWA's pension plans violated the U.S. Constitution. (*See* C.A. App. at 394.) In response, the PBGC filed a lawsuit seeking a declaratory judgment that the 1991 amendment was constitutional. *Id.; see also Pension Benefit Guar. Corp. v. Icahn, et al.*, No. 4:92-cv-00371-DBB (W.D. Mo. 1992).[4]

As TWA's reorganization efforts developed, two inter-related obstacles emerged. *First*, although the various TWA unions offered to make wage and benefit concessions, (C.A. App. at 389-90, 502-03), TWA failed to raise $200 million in needed operating capital. (C.A. App. at 395.) *Second*, the PBGC's announced intention to terminate the plans and the size of its alleged claim deterred potential sources of financing for TWA. It also threatened the TWA pilots' pensions, which, in the event of Plan termination, would have been capped by the statutory limit on the PBGC's pension guarantee. In 1992, that limit was $28,000, an amount below many of the pilots' expected retirement benefits.[5] Because of their keen interest in this issue, TWA's pilots conditioned their wage and benefit concessions on satisfactory resolution of the PBGC's claim. (C.A. App. at 394, 504-05.)

The CSA negotiated among all affected parties eliminated these obstacles to TWA's reorganization. The CSA provided, among other things, that:

Icahn would loan $200 million to TWA;

---

[3] *See* H.J. Res. 157, 102d Cong. § 214, 105 Stat. 1701, 1718-19 (1991).

[4] Upon motion by the PBGC, the District Court dismissed the PBGC's declaratory judgment action on November 23, 1992, shortly after the parties had successfully negotiated the major terms of the CSA.

[5] *See* 29 U.S.C. § 1322(b)(3)(B); 29 C.F.R. § 4022.22 & app. D (2005).

> TWA would contribute $300 million to TWA's pension plans;
>
> TWA's pension plans would not be terminated immediately, but instead would be sponsored by an Icahn entity (Pichin), which was responsible for minimum funding requirements in excess of TWA's $300 million payment;
>
> If certain defined "Significant Events" occurred in the future, the PBGC would terminate the TWA pension plans upon a request from Pichin; and
>
> TWA's future potential ERISA liability in the event of termination would be extinguished, and Icahn's termination payments were fixed at no more than $240 million.

Allied Pilots, 334 F.3d at 96, 98 (citing the CSA).

The PBGC expressly represented and warranted to Icahn that the CSA "shall constitute legal, valid, and binding contracts . . . enforceable against the PBGC" and "will not violate any provision of Title IV of ERISA," (C.A. App. at 204-05), and provided a formal opinion by its General Counsel that the CSA "constitute[s] legal, valid and binding obligations of PBGC" and "do[es] not conflict with Title IV of ERISA . . . ." (C.A. App. at 687.) Similarly, ALPA represented and warranted that its execution of the CSA was "duly authorized by all necessary action, including where necessary action of its membership," which included the Pilots.[6] (C.A. App. at 207.) In agreeing to the CSA, Icahn relied on its text and on these express statements of authority by the PBGC and the Pilots' union.

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[6] Each of the Pilots was an active TWA pilot when ALPA, the exclusive collecting bargaining agent for all active TWA pilots, signed the CSA. (C.A. App. at 26, 79-85.) Accordingly, each of the Pilots is bound by that agreement.

The Bankruptcy Court approved the CSA in December 1992 after finding that it was essential to a successful TWA reorganization:

> it would be an extremely difficult task to propose a plan absent resolution of those matters that have preceded [the CSA] as well as this settlement. Absent the negotiations that have taken place and the resolutions, it would be likely that any plan that would be proposed could not *possibly* be confirmed as originally presented.

(C.A. App. at 530) (emphasis supplied). The Bankruptcy Court also held that:

> [The Icahn $200 million] financings are critical to the continued operation of TWA's business and the ability of TWA to propose a feasible plan of reorganization.

(C.A. App. at 486.)

When the Bankruptcy Court approved the CSA, ***none*** of the TWA pilots or their union objected to it. (C.A. App. at 533-684.)[7] Instead, they reaped the benefits of their bargain. As the cornerstone of TWA's reorganization, the CSA enabled TWA to continue operations and the Pilots to remain employed. TWA pilots who were already retired or who chose to retire at the time of the CSA received (and still receive to this day) their full benefits. (*See* C.A. App. at 218).[8] When active pilots—including Petitioners—later retired, Pichin's Plan sponsorship allowed them to receive

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[7] Indeed, ALPA advocated for the CSA. (*See* C.A. App. at 532). The CSA and the negotiations leading to it were no secret. They were widely reported in the press at the time. (C.A. App. at 716-22.)

[8] The Petition misleadingly states that termination of the Plan "resulted in the immediate reduction of the monthly benefit paid to petitioners and other retired TWA pilots." Pet. at 4. This statement is inaccurate to the extent it includes pilots who were already retired or who chose to retire at the time the CSA was signed.

timely payment of full benefits under the Plan for several years, rather than the lower amount that would have been guaranteed by the PBGC had the Plan been terminated in 1992. *See Allied Pilots*, 334 F.3d at 99. Finally, because the PBGC's guarantee cap, by law, increases annually, the eight-year postponement in Plan termination increased the PBGC's statutory guarantee maximum at the time of termination by 44% over the guaranteed amount in 1992. *Id.*

B. The PBGC Terminates The Plan And The Pilots' Union Files A Lawsuit Attacking The CSA.

Eight years after the Bankruptcy Court approved the CSA, Pichin requested that the PBGC terminate TWA's pension plans as required by the CSA because "Significant Events" had occurred. The PBGC terminated the plans effective January 1, 2001. *Allied Pilots*, 334 F.3d at 96.

As the Pilots alleged in their complaint, several active and retired TWA pilots then urged their union, ALPA, to file a lawsuit challenging the PBGC's termination of the Pilots Plan pursuant to the CSA as violative of ERISA. (C.A. App. at 47 ¶ 88.) The District Court granted summary judgment for defendants PBGC and Pichin, and the D.C. Circuit affirmed. *Air Line Pilots Ass'n, Int'l v. Pension Benefit Guar. Corp.*, 193 F. Supp. 2d at 220-21; *Allied Pilots*, 334 F.3d at 99.

C. The Pilots File A Second Lawsuit Attacking The CSA.

Six weeks after the District Court's dismissal order, the Pilots filed ***another*** lawsuit—*Adams I*, the subject of this Petition—challenging the CSA and Plan termination. (C.A. App. at 15-76.) The Pilots challenged the PBGC's Plan termination and several terms of the CSA, including its provisions capping Icahn's termination payments at $240 million. The Pilots also asserted claims against ALPA, their own collective bargaining representative, arguing that ALPA had

breached duties to them by signing the CSA and by not seeking preliminary relief to enjoin Plan termination. (C.A. App. at 73 ¶ 178.) The District Court, recognizing that the outcome of the *Allied Pilots* appeal could resolve the new, nearly identical lawsuit, stayed *Adams I* pending the appeal. (C.A. App. at 76.) Notwithstanding the potential impact of the D.C. Circuit's rulings on their rights, the Pilots never sought to intervene in *Allied Pilots*, or even to file a brief *amicus curiae*.

D. The Court Of Appeals Issues The 2003 *Allied Pilots* Decision Upholding The PBGC's Authority To Enter Into The CSA.

In *Allied Pilots*, the D.C. Circuit affirmed the District Court's dismissal and decisively rejected the belated ERISA attack on the CSA and the PBGC's termination of the pension plan. The scope of the PBGC's settlement authority under 29 U.S.C. §§ 1362 and 1367 was specifically discussed in the briefs submitted to the D.C. Circuit. The PBGC's briefs discussed the PBGC's settlement authority and argued that the CSA's provisions were authorized by ERISA, specifically sections 1367 and 1362(b)(3). *See* Docket No. 02-5144 (1/31/03) (Brief of Appellee PBGC) at 7-8 & 19. Sections 1362 and 1367 were quoted fully in the statutory appendix to the PBGC's brief. *Id.* The pilots' union appellant expressly challenged the PBGC's interpretation of section 1367. *See* Docket No. 02-5144 (2/14/03) (Reply Brief of Appellants) at 8-9, n.2.

It was in this context that the Court of Appeals in *Allied Pilots* held, at the very beginning of its opinion:

> ***Because*** we conclude that federal law authorizes the PBGC to enter into ***settlement agreements like the one challenged in this case***, we agree with the district court that the PBGC's termination of TWA's pension plans was permissible.

Allied Pilots, 334 F.3d at 95 (emphases added). Thus, the Court of Appeals ruled that Plan termination was legal "***[b]ecause***" it first "conclud[ed]" that the CSA, which included the provision capping Pichin's payments at $240 million, was authorized by ERISA. *Id.* (emphasis added). The Court further stated that

> ***The PBGC's general authority to enter into liability settlements comes from ERISA section 4067***, which ***empowers*** the PBGC "to make arrangements with [plan] sponsors and members of their controlled groups who are or *may become* liable under [the statute] for payment of their liability." As the bankruptcy court found, ***the PBGC entered into the CSA pursuant to its section 4067 authority.*** Under the CSA, Icahn agreed to accept the ongoing role of plan sponsor and to contribute funds to shore up the plans; in return, the PBGC agreed to postpone—perhaps indefinitely—its termination of TWA's plans, to cap Icahn's direct liability in the event of termination at $240 million, and to terminate the plans, upon request, if Icahn received unfavorable tax treatment concerning his status as plan sponsor. ***Each of these promises and counter-promises formed an integral part of the overall negotiated settlement, whose purpose was to prevent termination altogether.***

Id. at 98-99 (internal citations omitted) (bold italic emphases added) (alteration in original).

Having found the CSA fully in accord with federal law, the Court of Appeals then rejected "the pilots' claim that the PBGC acted arbitrarily and capriciously" in terminating the plan pursuant to the CSA. *Id.* at 98. In sum, the Court of Appeals held *both* that the CSA was lawful under ERISA *and* that it mandated the PBGC's termination of the pension plan.

E. The Pilots Amend Their Complaint And File A Third Lawsuit Attacking The CSA, And The District Court Dismisses Both Cases.

Despite the Court of Appeals' clear holdings in *Allied Pilots* upholding the CSA and Plan termination pursuant to it, the Pilots persisted in their new lawsuit by amending their complaint. (C.A. App. at 77-114.) The Pilots also filed another lawsuit in the District Court seeking a writ of mandamus against the PBGC, alleging that "[t]he limitation on the Termination Liability of Pichin and its controlled group as set forth in the [CSA] . . . violates [ERISA] and is, therefore, void and unenforceable." (C.A. App. at 164 ¶ 21.) In other words, the Pilots' fundamental claim in both cases was that the PBGC had no authority under ERISA to settle TWA's and Icahn's pension liabilities unless it did so by "settling" for payment of 100% of the amount that the PBGC estimated as the plan's unfunded liability—a drastically different arrangement than the negotiated terms of the CSA and of many other settlements the PBGC has negotiated with plan sponsors. *See* footnote 9 and § III.B, *infra*.

On August 25, 2004, the District Court dismissed both cases, ruling on two alternative grounds.

First, the District Court held that *stare decisis* barred the Pilots' claims. It held that the *Allied Pilots* holding that "'federal law authorizes the PBGC to enter into settlement agreements like the one challenged in this case'" was "binding precedent" that foreclosed the Pilot's claims that the liability settlement violated ERISA. *Adams*, 332 F. Supp. 2d at 236 (quoting *Allied Pilots*, 334 F.3d at 95).

Second, and alternatively, the District Court held that, even if *stare decisis* did not bar the Pilots' claims, they lacked substantive merit. *Id.* The District Court specifically analyzed and rejected the Pilots' contention that the termination liability settlement in the negotiated CSA was a prohibited

"transaction to evade liability" within the meaning of 29 U.S.C. § 1369(a). *Id.* at 236-37. It also held that ERISA's provisions authorizing the PBGC to agree to "alternative arrangements for the satisfaction of [ ] liability" was "an express grant of settlement authority" that authorized the CSA, including the $240 million settlement payment cap. *Id.* at 237. And it found further authority for the settlement in 29 U.S.C. § 1367, upon which the Court of Appeals in *Allied Pilots* had relied in upholding the implementation of the CSA. *Id.* The District Court therefore concluded that "the CSA constitutes a statutorily authorized arrangement to settle unfunded liability . . . ." *Id.*

F. The Court Of Appeals Affirms The District Court On Both Grounds And Adopts Its Reasoning.

The Pilots appealed and, after full briefing on the merits and oral argument, the Court of Appeals affirmed the judgment of the District Court in a unanimous *per curiam* Judgment issued on January 27, 2006. The Court of Appeals, like the District Court, did not rely solely upon *stare decisis* grounds, but also addressed and rejected the Pilots' arguments on the merits. The Court of Appeals Judgment ordered

> . . . that the judgment of the district court be affirmed for the reasons stated in the opinion of the district court, except insofar as the district court based Part IV.C of its decision upon the alternative ground of res judicata.

Adams v. Pension Benefit Guar. Corp., 170 Fed. Appx. 142 (D.C. Cir. 2006) (unpublished) (citation omitted), Pet. App. at 3-4. Petitioners sought rehearing *en banc*, which was denied by a *per curiam* order issued on April 28, 2006. Pet. App. at 1-2.

REASONS FOR DENYING THE WRIT

The Petition should be denied. Petitioners have identified no compelling reason to grant it under the Court's well established criteria for granting certiorari. *See* S. Ct. R. 10.

Moreover, as explained below, the unique procedural circumstances of this case render it a poor vehicle for considering the issue raised by Petitioners—which, in any event, was correctly resolved by the Court of Appeals. Finally, Congress's recent enactment of comprehensive pension reform legislation—including special provisions relating to airlines—refutes Petitioners' suggestion that review by this Court is needed to assure the solvency and proper functioning of the pension system under ERISA.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS.

Petitioners do not suggest that any conflict among the circuits justifies review by this Court—and for good reason. Two other decisions have addressed the issue of the PBGC's settlement authority under ERISA in the context of a comprehensive bankruptcy reorganization, where (as here) the debtor, the PBGC, and representatives of the debtor's employees all participated fully in the negotiations. In both cases the courts concluded, consistent with the judgment below, that the PBGC has authority to settle unfunded benefit liabilities claims. *See Allied Pilots*, 334 F.3d at 95, 98-99; *see also In re: UAL Corp.*, 428 F.3d 677 (7th Cir. 2005) (citing *Allied Pilots* and holding that the PBGC has authority to enter into agreement with United Airlines to settle unfunded benefit liabilities claims under "29 U.S.C. § 1367, which enables PBGC to seize opportunities to avoid inefficient litigation and to increase the certainty of its recoveries").

Nor do Petitioners suggest any conflict with any decision of this Court. *See* S. Ct. R. 10(c). Their sole claim is that the decision below, which upheld the PBGC's exercise of settlement authority that the agency duly reported to Con-

gress[9], and which Congress never has questioned or sought to curtail, conflicts with Congress's intent in enacting ERISA.

II. THE UNIQUE PROCEDURAL CIRCUMSTANCES OF THIS CASE ESTABLISH SUBSTANTIAL EQUITABLE DEFENSES THAT RENDER IT AN INAPPROPRIATE VEHICLE FOR ADDRESSING THE ISSUE OF THE PBGC'S SETTLEMENT AUTHORITY.

Petitioners filed this case in May 2002—nine years after the Bankruptcy Court approved the CSA, and after the District Court granted summary judgment against the ALPA

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[9] *See, e.g.*, Pension Benefit Guaranty Corporation Fiscal Year 1994 Annual Report to Congress, at 9 (C.A. App. at 851) (describing settlement of PBGC's $900 million termination liability claim against Pan Am Corporation for $110 million); Pension Benefit Guaranty Corporation Fiscal Year 1993 Annual Report to Congress, at 13 (C.A. App. at 854) (describing settlement of PBGC's $700 million termination liability claim against Continental Airlines for its joint and several liability for Eastern Air Lines' terminated pension plans for $21 million in cash, an airplane trust worth $70-75 million, and approximately 5% of new Continental common stock); *id.* at 13 (C.A. App. at 854) (describing settlement of TWA's and Icahn's liability and the CSA's terms, including settlement of the $1 billion claim for the amounts set forth in the CSA); *id.* at 14 (C.A. App. at 855) (describing settlement of PBGC's $220 million termination liability claim against CF&I Corporation for business interests, cash, and other consideration estimated at a value of $33 million); Pension Benefit Guaranty Corporation Fiscal Year 1992 Annual Report to Congress, at 15 (C.A. App. at 858) (describing CSA: "The total present value of the TWA and Icahn commitments is $259-410 million. In return for the minimum funding and termination commitments, PBGC has released TWA and the Icahn group from any further liability for TWA's pension plans."); *id.* at 16-17 (C.A. App. at 859-860) (describing potential settlement with New Valley Corporation: "In May, PBGC and New Valley reached an agreement in principle under which PBGC would terminate a New Valley plan that is underfunded by about $420 million. Under the agreement, PBGC anticipates receiving a distribution of cash and securities worth between $200 and $210 million.").

plaintiffs in the *Allied Pilots* lawsuit. *See* Pet. at 4, 7; *supra* pp. 6-7. Because of Petitioners' delay in asserting their claims, they are subject to a variety of legal and equitable defenses, summarized below, that Pichin raised in the District Court and the Court of Appeals.

For that reason, this case is a poor vehicle for resolving the question presented by Petitioners. As Petitioners themselves assert, the PBGC has entered into other recent settlements in airline bankruptcy cases and additional airline bankruptcies are pending. *See* Pet. at 18-19. Even assuming that the PBGC's ongoing exercise of its settlement authority—which is long-standing and has regularly been reported to Congress, which has never challenged it, *see infra* pp. 23-24—is worthy of review, this case is not the appropriate case in which to do so.

The defenses asserted by Pichin include the following:

Res judicata. The doctrine of *res judicata* bars a plaintiff from asserting legal theories that were brought or that ***could have been*** brought in a prior suit by the same party or those in privity with it. *Nevada v. United States*, 463 U.S. 110, 129-30 (1983). In the court below, Pichin argued that the decision in *Allied Pilots* was *res judicata* barring the claims that are the subject of the Petition. *See* Docket No. 04-5333 (9/21/2005) (Brief of Appellee/Cross-Appellant Pichin Corporation) at 29-33. Because both cases arose out of the CSA and challenged its legality, they indisputably involve the "same cause of action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979).

The "same parties" requirement similarly is satisfied because *res judicata* binds not only persons literally party to the first suit but also those in privity with them. *Nevada*, 463 U.S. at 129-30. "[O]ne whose interests were adequately represented by another vested with the authority of representation is bound by the judgment . . . ." *Expert Elec., Inc. v. Levine*, 554 F.2d 1227, 1233 (2d Cir. 1977). Applying this

principle to bar the Pilots from re-litigating claims brought unsuccessfully by their union is plainly appropriate here. *See Monahan v. N.Y. City Dep't of Corr.*, 214 F.3d 275, 285 (2d Cir. 2000).[10] The Pilots all are former TWA pilots and present or former ALPA members who maintained in their original complaint that ALPA had a ***duty*** to represent them with respect to Plan termination.[11]

Alternatively, the "same parties" requirement also is satisfied under the principle of virtual representation. "[A] person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative." *Aerojet-Gen. Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975); *see also Tyus v. Schoemehl*, 93 F.3d 449, 454 (8th Cir. 1996). The Court of Appeals, which has not recognized the doctrine of virtual representation,[12] declined to affirm that portion of the District Court's judgment which held that *res judicata* barred one of Petitioners' claims. *See* Pet. App. at 3-4. However, were this Court to grant the writ, Pichin will assert *res judicata* as an alternative ground upon which the judgment below should be affirmed.

Laches. A claim is barred by laches where there has been "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States*, 365 U.S. 265, 282 (1961).

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[10] *See also Utah Power & Light Co. v. Interstate Commerce Comm'n*, 764 F.2d 865, 871 (D.C. Cir. 1985) (member of public utility association barred by participation of association in prior suit); *W. Coal Traffic League v. Interstate Commerce Comm'n*, 735 F.2d 1408, 1410-11 (D.C. Cir. 1984); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1082 (9th Cir. 2003).

[11] (C.A. App. at 79-85 ¶¶ 4-10; C.A. App. at 18-25 ¶¶ 6-13; C.A. App. at 51-52.)

[12] *See Ethnic Employees of the Library of Cong. v. Boorstin*, 751 F.2d 1405, 1411 n.8 (D.C. Cir. 1985).

Equitable defenses including laches apply in ERISA actions. *Fotta v. Trustees of the United Mine Workers of Am., Health & Ret. Fund*, 165 F.3d 209, 214 (3d Cir. 1998).

This suit presents a textbook case for application of laches. *First*, Petitioners were not "diligent." They entered the CSA to induce Icahn's funding and to avoid Plan termination in 1992. Only after benefiting from the CSA for eight years did Petitioners challenge its legality. *Second*, there has been prejudice to Icahn, who relied on the CSA provisions Petitioners belatedly challenge when he complied with the CSA's requirements that he loan $200 million to TWA and assume sponsorship of the pension plan. (*See* C.A. App. at 184-86.) "Equity will not protect a party that through years of silence has created an impression of acquiescence that has led others to make substantial financial commitments." *Indep. Bankers Ass'n of Am. v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980).

Waiver. For similar reasons, Petitioners waived any challenge to the terms of the CSA when they failed to object to it in 1992-93. Waiver is an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Petitioners were creditors in TWA's bankruptcy and, through their union, parties to the CSA. Yet neither Petitioners nor their union objected to the CSA on the grounds Petitioners belatedly have raised in this lawsuit.

Estoppel. "Under the doctrine of equitable estoppel, 'a party with full knowledge of the facts, which accepts the benefits of a transaction, contract, statute, regulation, or order may not subsequently take an inconsistent position to avoid the corresponding obligations or effects.'" *First Am. Disc. Corp. v. Commodity Futures Trading Comm'n*, 222 F.3d 1008, 1016 (D.C. Cir. 2000) (quoting *Kaneb Servs., Inc. v. FSLIC*, 650 F.2d 78, 81 (5th Cir. 1981)). Equitable estoppel applies even to claims that challenge a federal agency's statutory authority. *See Fed. Power Comm'n v. Colo. Inter-*

state Gas Co., 348 U.S. 492, 502 (1955) (where agency conditioned merger approval on exclusion of certain losses from "cost of service" surcharges, the merged company was estopped from challenging agency's enforcement of the exclusion terms because it "cannot now be allowed to attack an officially approved condition of the merger while retaining at the same time all of its benefits"). Having accepted the benefits of the CSA, including preservation of their jobs and substantial increases in guaranteed pension benefits, Petitioners are equitably estopped from challenging it now.

Equitable mootness. Because Petitioners' claims would upset the CSA, which was the cornerstone of the TWA bankruptcy reorganization, equitable mootness bars their lawsuit. The equitable mootness doctrine bars a party from appealing or challenging a bankruptcy court's order when (i) no stay of that order has been obtained or diligently pursued, (ii) the reorganization plan has been substantially consummated, and (iii) the relief sought in a successful appeal would upset a portion of the confirmed and consummated reorganization plan. *In re AOV Indus. Inc.*, 792 F.2d 1140, 1147-49 (D.C. Cir. 1986). Equitable mootness is not an Article III consideration, but a balancing of equitable and prudential factors. *In re Continental Airlines*, 91 F.3d 553, 560 (3d Cir. 1996) (en banc). It poses a bar when, "even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable." *Official Comm. of Unsecured Creditors of LTV Aerospace & Defense Co. v. Official Comm. of Unsecured Creditors of LTV Steel Co. (In re Chateaugay Corp.)*, 988 F.2d 322, 325 (2d Cir. 1993).

Because Petitioners did not challenge, let alone seek a stay of, the Bankruptcy Court's Confirmation Order or the Order approving the CSA, (C.A. App. at 533-684), a "strong presumption of mootness" applies to their claims. *AOV*, 792 F.2d at 1149. Moreover, effective and fair relief simply is not possible without "unravel[ing] intricate transactions" and

"knock[ing] the props out from under the authorization for every transaction that has taken place . . . ." *Frito Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 952-53 (2d Cir. 1993) (quoting *Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793, 797 (9th Cir. 1981)). The Bankruptcy Court ruled that "the terms of the [CSA] . . . are each integral and mutually interdependent components of a compromise and settlement," (C.A. App. at 483-84), and that the Icahn $200 million financing was "*critical* to the continued operation of TWA's business and the ability of TWA to propose a feasible plan of reorganization." (C.A. App. at 486) (emphasis supplied). Icahn's $200 million loan and his assumption of the pension plans were premised on the validity of the CSA's Plan termination provisions. Petitioners and the beneficiaries of other TWA pension plans have now received their benefits and are not proposing to return them. TWA, the pre-CSA sponsor of the Plan and post-CSA Benefits Administrator, (C.A. App. at 214), has been absorbed into American Airlines. Even if it were possible to unwind the CSA thirteen years after it was approved by the Bankruptcy Court, the disruption caused by such unwinding would be immense, and any relief to Petitioners would be inequitable. *See Continental Airlines*, 91 F.3d at 565-66; *In re Specialty Equip. Cos.*, 3 F.3d 1043, 1048-49 (7th Cir. 1993); *Halliburton Serv. v. Crystal Oil Co. (In re Crystal Oil Co.)*, 854 F.2d 79, 81 (5th Cir. 1988).

III. ERISA AUTHORIZED THE CSA'S TERMINATION LIABILITY SETTLEMENT PROVISIONS.

A. The Statutory Language Authorized The Settlement Agreement.

The PBGC's agreement to settle its claim against TWA and Icahn for unfunded benefit liabilities is supported by express language in ERISA authorizing the PBGC to make "arrangements for the *satisfaction* of liability . . . ." 29 U.S.C. § 1362(b)(3) (emphasis added). The term "satis-

faction" is not limited only to full payment, but means "[t]he performance of a *substituted* obligation in return for the discharge of the original obligation." *Black's Law Dictionary* (6th ed., abridged, 1991) (emphasis added). The PBGC may, and did, "substitute" an alternative obligation—in this case, all of Icahn's counter-promises recited in the CSA, including immediate cash contributions—to conclude that there had been "satisfaction" of its (disputed) claim against Icahn and TWA for unfunded benefit liabilities.

Indeed, in 1992 when the PBGC, TWA, Icahn, and the unions agreed to the CSA, it certainly was not clear that the PBGC *was* settling for less than 100% of liability. The PBGC's $1.124 billion claim was its *estimate* of the unfunded benefit liabilities of TWA's pension plans. Whether that estimate was the actual amount of ERISA liability was a question for litigation—as was the issue of whether any amount that was ultimately adjudicated to be an unfunded liability and that could not be recovered from TWA was recoverable from Icahn. Moreover, if the pension plans never terminated after TWA's reorganization, or if estimated unfunded benefit liabilities were less than $240 million upon termination, the PBGC *would* get a full recovery. The same issue would arise if, for example, the PBGC accepted securities in lieu of cash (which ERISA expressly permits, *see* 29 U.S.C. § 1362(b)(2)(A)), and those securities later substantially decreased in value. The Pilots' reading of the statute would require the agency to have perfect foresight.

The PBGC's authority to settle for less than full estimated liability also derives from the structure of 29 U.S.C. § 1362(b). That section, which addresses a plan sponsor's liability to the PBGC upon termination, has three subsections: "(1) Amount of liability"; "(2) Payment of liability"; and "(3) Alternative arrangements." Placing subsection (3)'s "alternative arrangements for the satisfaction of liability" clause outside the more specific subsection discussing means for "payment" of liabil-

ity, indicates that the PBGC's authority to make "alternative arrangements" is *in addition to* and *separate from* the more limited "payment" terms in Section 1362(b)(2). In Section 1362(b)(2)(B), Congress provided that the PBGC ***must*** offer deferred payment to plan sponsors. 29 U.S.C. § 1362(b)(2)(B) ("Any such terms prescribed by the corporation ***shall*** provide for deferral . . . .") (emphasis added). To read the separate section for "alternative arrangements" to mean that the PBGC is authorized *only* to offer "deferred payment"—a term not mentioned in subsection 1362(b)(3)—would wrongly render subsection 1362(b)(3) duplicative and superfluous. *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986) ("It is an 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.'") (quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *see also United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal quotation marks and citation omitted). In contrast, interpreting "alternative arrangements" to include authority for the CSA's terms for an immediate cash infusion into the plans, a new plan sponsor, guaranteed termination liability payments, and continuation of the plans as "element[s] of a liability settlement aimed at preventing termination altogether," *Allied Pilots*, 334 F.3d at 98, gives meaning to each subsection of Section 1362.

Moreover, other provisions of ERISA also authorized the CSA. *First*, 29 U.S.C. § 1302(b)(1) expressly provides that the PBGC may "sue and be sued," which is an implicit authorization to settle. *See, e.g., In re Smart World Techs., LLC*, 423 F.3d 166, 174-75 (2d Cir. 2005) (finding that trustee's statutory power to sue and be sued "presumably includes the derivative power to settle suits"); *New York Air Brake Corp. v. Gen. Signal Corp.*, 873 F. Supp. 747, 753 (N.D.N.Y. 1995) ("[I]t is inherent in the adversarial system in which this country operates, that parties to litigation or

dispute hold the authority to settle that litigation or dispute outside the confines of the court at any time before, during, or after the conduct of the proceedings."). *Second*, 29 U.S.C. § 1367 broadly authorizes the PBGC to "make arrangements with contributing sponsors and members of their controlled groups who are or may become liable under section 1362, 1363, or 1364 of this title for payment of their liability, including arrangements for deferred payment of amounts of liability to the corporation accruing as of the termination date on such terms and for such periods as the corporation deems equitable and appropriate." This broad language, which recognizes that the PBGC may make arrangements "including"—but not limited to—arrangements for deferred payment, is broad enough to encompass settlements of contested claims in the context of a bankruptcy reorganization. *See West v. Gibson*, 527 U.S. 212, 217 (1999) ("[T]he preceding word 'including' makes clear that the authorization is not limited to the specified remedies there mentioned . . . .").

The PBGC's interpretation of ERISA to authorize the CSA, including the $240 million payment cap, was the most reasonable construction of the statute. Moreover, that expert interpretation of ERISA is entitled to deference. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 648 (1990) (applying *Chevron* deference to the PBGC's decision to restore terminated pension plan).[13] In ERISA, Congress gave the PBGC a "broad" "grant of authority," *LTV*, 496 U.S. at 648, to (1) "encourage the continuation and maintenance of

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[13] In light of the PBGC's longstanding and consistent interpretation of its settlement authority, as well as the plain statutory language quoted above, this Court need not decide whether *Chevron* deference applies to the PBGC's actions in order to affirm. Because the PBGC is "charged with administering this highly detailed regulatory scheme," this Court should extend considerable weight to the PBGC's "'body of experience and informed judgment'" concerning the statute it enforces. *Wells Fargo Bank, N.A. v. F.D.I.C.*, 310 F.3d 202, 208 (D.C. Cir. 2002) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

voluntary private pension plans for the benefit of their participants," (2) "provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries," and (3) "maintain [plan sponsor] premiums . . . at the lowest level consistent with carrying out [PBGC's] obligations under [Title IV of ERISA]." 29 U.S.C. § 1302(a). The PBGC was uniquely positioned to determine how it could most effectively carry out these sometimes competing statutory duties in 1992. *See Brown v. PBGC*, 821 F. Supp. 26, 31 (D.D.C. 1993) (noting need to defer to the PBGC in light of its arguably competing statutory duties). It chose to perform those duties by entering into the CSA, which permitted the confirmation of the TWA reorganization plan and uninterrupted pension payments to Plan beneficiaries for nearly a decade. This Court should extend deference to that complex decision.

B. The Legislative History Further Supports The PBGC's Statutory Authority To Enter Into Liability Settlements Like the CSA.

The Petitioners wrongly assert that the legislative history of ERISA demonstrates that the PBGC exceeded its statutory authority by entering into the CSA. To the contrary, the legislative history evidences Congress's approval of liability settlements like the CSA.

The Pilots' reliance on the now-defunct Section 1304(f) provisions is misplaced. Pet. at 14-17. While ERISA, as originally enacted, specifically granted the PBGC temporary transition authority to remove recently terminated plans from the operation of the new statute's complicated provisions, this does not mean that other provisions of the statute did not grant the PBGC broad authority to enter into liability settlements. Congress understandably sought to avoid disrupting settled expectations that could be affected by a new, comprehensive regulatory scheme by specifically providing

that the brand new regulatory agency would have maximum flexibility during the initial implementation of ERISA.

Importantly, however, and as the Pilots concede, in 1986 Congress repealed 29 U.S.C. § 1304(f)(4) and ERISA's other moribund emergency provisions. Pet. at 15 n.7 (citing Pub. L. No. 99-272, Title XI, § 11016(c)(6), April 7, 1986, 100 Stat. 82). During that comprehensive restructuring of ERISA, Congress reinforced the PBGC's settlement authority by adding the express statutory language codified at Section 1362(b)(3) authorizing the PBGC to reach—in addition to deferral of payments under subsection (b)(2)—alternative "arrangements for the satisfaction" of termination liability. Single-Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, Title XI, § 11011(a)(2), 100 Stat. 82, 253-57. The PBGC signed the CSA ***six years later***. The repealed temporary provisions of ERISA are inapposite.

Moreover, the PBGC's interpretation of ERISA to give the agency authority to compromise termination liability amounts has been longstanding, public, and ***expressly*** reported to Congress each year. *See* C.A. App. at 849-60 and footnote 9, *supra*. If, as Petitioners suggest, Congress intended to require the PBGC to settle for the full amount of the PBGC's estimated liability, one would have expected Congress to remedy such persistent flouting of legislative intent—particularly when Congress comprehensively reviewed and amended ERISA in 1994 and again in 2006 to remedy underfunding of the PBGC's reserves. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780; Retirement Protection Act of 1994, Pub. L. No. 103-465, Title VII(F), 108 Stat. 4809, 5012-50.

Petitioners' suggestion that review is needed to correct the PBGC's reading of ERISA and thereby rescue the nation's pension system is belied by Congress's recent enactment of comprehensive pension reform legislation that does not diminish the settlement authority that the PBGC repeatedly

has exercised and reported to Congress. Although Congress's stated purpose in revisiting ERISA was to once again address the PBGC's growing deficit, nothing in the recent amendments restricted or otherwise limited the PBGC's settlement authority. To the contrary, the Pension Protection Act of 2006 includes special provisions intended to reduce the pension burden on the airline industry. *See* Pub. L. No. 109-280, § 402, 120 Stat. 780, 922 *et seq.*

"[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (internal quotation marks and citation omitted); *see also LTV*, 496 U.S. at 650 (where "Congress was aware of the action taken by the PBGC" and did not amend ERISA, "[t]he conclusion that Congress thought the PBGC was properly exercising its authority is at least as plausible as any other").

Congress's acquiescence in the PBGC's consistent interpretation of ERISA is understandable, since Petitioners' proposed reading would harm the very workers ERISA was enacted to protect. Petitioners' reading of the statute would force the PBGC to litigate every termination liability case, thereby wasting an enormous amount of resources that otherwise would be used to pay guaranteed benefits and foreclosing the possibility of termination liability settlements that—because of the pitfalls of litigation and the uncertainty of judgment collection—would benefit all parties, including plan participants. Moreover, the prolonged litigation that inevitably would arise in bankruptcy cases involving huge pension plans where the PBGC is a major creditor would foreclose Chapter 11 reorganization of distressed companies and force their liquidation. It is inconceivable that Congress intended such an expensive, socially disruptive result.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

29 U.S.C. § 1369

Treatment of transactions to evade liability; effect of corporate reorganization.

(a) Treatment of transactions to evade liability

If a principal purpose of any person in entering into any transaction is to evade liability to which such person would be subject under this subtitle and the transaction becomes effective within five years before the termination date of the termination on which such liability would be based, then such person and the members of such person's controlled group (determined as of the termination date) shall be subject to liability under this subtitle in connection with such termination as if such person were a contributing sponsor of the terminated plan as of the termination date. This subsection shall not cause any person to be liable under this subtitle in connection with such plan termination for any increases or improvements in the benefits provided under the plan which are adopted after the date on which the transaction referred to in the preceding sentence becomes effective.

(b) Effect of corporate reorganization

For purposes of this subtitle, the following rules apply in the case of certain corporate reorganizations:

(1) Change of identity, form, etc.

If a person ceases to exist by reason of a reorganization which involves a mere change in identity, form, or place of organization, however effected, a successor corporation resulting from such reorganization shall be treated as the person to whom this subtitle applies.

(2) Liquidation into parent corporation

If a person ceases to exist by reason of liquidation into a parent corporation, the parent corporation shall be treated as the person to whom this subtitle applies.

(3) Merger, consolidation, or division

If a person ceases to exist by reason of a merger, consolidation, or division, the successor corporation or corporations shall be treated as the person to whom this subtitle applies.